

DEPARTMENT OF STATE REVENUE

REVENUE RULING #2001-07IT

August 21, 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

STATEMENT OF FACTS

The Taxpayer is a foreign corporation that resells long distance telephone and Internet services to customers in Indiana and all other states. The Taxpayer also has broker relationships with third party vendors for the sale of products and services, including wireless communications, propane, and home heating oil. The Taxpayer does not resell these products and services but rather receives a commission for acquiring customers who deal directly with the third party vendors.

The Taxpayer conducts these business activities largely through its Internet website. Regarding its long distance telephone and Internet service resales, the Taxpayer solicits sales, facilitates billing, and provides customer support online. Customer invoices are posted on its website, and customer payments are remitted directly to the Taxpayer by credit card online. Paper billing through the mail is available by request. Regarding its brokering activities, the Taxpayer solicits customers for third party vendor products and services also through its website.

The Taxpayer relates that all of its sales and customer support functions are managed from its headquarters outside of Indiana. The Taxpayer further indicates that service offers customers make online are accepted or rejected by the Taxpayer outside of Indiana, and that the Taxpayer does not own or lease any property in any state other than the state of its headquarters.

The Taxpayer relates that it is registered in all states for required state transactional excise taxes (e.g., sales and use tax, telecommunications tax, and public utility fees) and that it has filed annual reports with all states in which it is registered to conduct business.

ISSUES, DISCUSSION, AND RULINGS

ISSUE I

Whether the Taxpayer's income from its Internet-based long distance telephone service resales, Internet service resales, and brokering activities is subject to Indiana adjusted gross income tax.

DISCUSSION I

IC 6-3-2-1 imposes adjusted gross income tax on adjusted gross income derived from sources within Indiana. IC 6-3-2-2(a) provides that adjusted gross income derived from Indiana sources includes income from “doing business” in Indiana. Rule 45 IAC 3.1-1-38, interpreting IC 6-3-2-2, provides that for apportionment purposes, a taxpayer is “doing business” in Indiana if it operates a business enterprise or activity in Indiana including, but not limited to, the following:

* * * *

(4) Rendering services to customers in Indiana;

* * * *

(7) Any other act in Indiana which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

Long distance telephone and Internet service resales to customers in Indiana constitute “rendering services to customers in Indiana” under Rule 45 IAC 3.1-1-38(4). Moreover the provision of long distance telephone and Internet services to Indiana businesses and residences is business activity which exceeds the mere solicitation of orders in Indiana. Therefore, the Taxpayer’s is “doing business” under IC 6-3-2-2 by rendering long distance telephone and Internet services in Indiana.

RULING I

The Taxpayer is required to file adjusted gross income tax and supplemental net income tax returns in Indiana. (Note that determinations applicable to adjusted gross income tax are also applicable to supplemental net income tax as provided by IC 6-3-8-2.)

ISSUE II

Whether the Taxpayer’s income from its Internet-based long distance telephone service resales, Internet service resales, and brokering activities is subject to Indiana gross income tax.

DISCUSSION II

IC 6-2.1-2-2 imposes gross income tax on “taxable gross income derived from activities or businesses or any other sources within Indiana.” The Indiana Tax Court has outlined a three-part inquiry to determine whether non-resident income is subject to gross income tax:

- (1) are the receipts “gross income,”
- (2) is the gross income derived from “sources within Indiana,” and
- (3) is the gross income that is derived from sources within Indiana “taxable gross income”?

First Nat’l Leasing and Fin. Corp. v. Ind. Dep’t of Revenue, 598 N.E.2d 640, 643 (Ind. Tax Ct. 1992).

(1) Gross Income

“Gross income” is defined by IC 6-2.1-1-2(a)(1) as “all the gross receipts a taxpayer receives . . . from trades, business, or commerce” Gross receipts from long distance telephone resales, Internet service resales, and brokering activities all fall within the definition of gross income because they are received from commerce.

(2) Indiana Source

Income has an Indiana “source” when a taxpayer’s income-producing activities establish an Indiana “business situs.” *First Nat’l Leasing*, 598 N.E.2d at 643; *Indiana-Kentucky Elec. Corp. v. Indiana Dept. of State Revenue*, 598 N.E.2d 647 (Ind. Tax Ct. 1992). “Business situs” contributes to the establishment of gross income tax liability in Indiana, but is insufficient in and of itself to trigger the taxation of non-resident income. *First Nat’l Leasing*, 598 N.E.2d at 644.

Rule 45 IAC 1.1-1-3 explains:

- (a) A “business situs” arises where possession and control of a property right have been localized in some business or investment activity away from the owner’s domicile.
- (b) A taxpayer may establish a business situs in ways, including but not limited to, the following:

* * * *

(2) Performance of services.

* * * *

Consistent with Rule 45 IAC 1.1-1-3, Rule 45 IAC 1.1-2-5(a) states that gross income derived from “the provision of a service of any character within Indiana” is subject to gross income tax.

The sale of telecommunications, which includes long distance telephone and Internet services, to Indiana customers constitutes the performance of services in Indiana. 45 IAC 1.1-2-5(f)(2). As such, these sales establish an Indiana business situs under Rule 45 IAC 1.1-1-3.

The Taxpayer’s online acquisition of Indiana customers for third party vendors cannot be understood as the performance of services in Indiana because the activity takes place solely on the Internet. Therefore, commissions earned by the Taxpayer for its Internet-based gathering of Indiana customer information for third party vendor products and services does not establish an Indiana business situs under Rule 45 IAC 1.1-1-3.

(3) Taxable Gross Income

Taxation of nonresidents is basically limited to receipts from activities connected with a business situs. *First Nat’l Leasing*, 598 N.E.2d at 644. Specifically, taxpayer activities which establish business situs must be “more than minimal and not remote or incidental” to the income-

producing transaction in order for the taxation of that income to be justified. *Indiana-Kentucky Elec. Corp.*, 598 N.E.2d at 663.

Rule 45 IAC 1.1-2-5(f)(2) deals specifically with the relationships and characteristics that must be present in order to tax telecommunication sales income in Indiana. The Rule states, “if the telecommunications originate or terminate in Indiana and are charged to an Indiana address, and the charges are not taxable under the laws of another state,” then Indiana gross income tax applies.

The Taxpayer’s long distance telephone and Internet service resales to Indiana customers clearly terminate in Indiana. Moreover the sales may be charged to Indiana addresses. Absent evidence presented by the Taxpayer of tax liability elsewhere, these sales are presumed to be taxable only in Indiana. Thus, Taxpayer’s long distance telephone and Internet service resales fall within the ambit of 45 IAC 1.1-2-5(f)(2).

RULING II

The Taxpayer’s income from long distance telephone service resales and Internet service resales is subject to Indiana gross income tax. The Taxpayer’s income from brokering activities is not subject to Indiana gross income tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer’s facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. Other taxpayers with substantially identical factual situations, however, may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in a statute, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Department of State Revenue